DISABILITY LAW UPDATE

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Overview

- Summary of employer's responsibilities under state law protecting the disabled - FEHA.
- An analytical framework for determining who qualifies for benefits under FEHA.
- Appropriate "Interactive Process" in response to a request for reasonable accommodation.

THE BREADTH AND DEPTH OF THE REACH OF DISABILITY RIGHTS LAW SHOULD AMAZE AND ASTOUND YOU!

DISABILTY RIGHTS UNDER FAIR EMPLOYMENT AND HOUSING ACT

- In enacting amendments to the Fair Employment and Housing Act (FEHA) in 2001, the California Legislature declared that, "The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (ADA). Although the federal act provides a floor of protection, this state's law has always, even prior to the passage of the federal act, afforded additional protections.

DISABILITY RIGHTS UNDER FEHA

- In addition, the Legislature has determined that the definitions of "physical disability" and "mental disability" under the law of this state require a "limitation", but do not require, as does the ADA, a "substantial limitation" upon a Major Life Activity. This distinction is intended to result in broader coverage under California law than under federal law.

DISABILITY RIGHTS UNDER FEHA

- FEHA affords protections to three different groups of employees:
- (1) Employees who currently have a disability;
- (2) Employees who have a record or history of a disability which is known to the employer; and
- (3) Employees who are "regarded or treated by the employer" as having, or having had, a disability. (Sometimes referred to as "perceived disabilities")

DISABILITY RIGHTS UNDER FEHA

- Furthermore, the Legislature affirmed the importance of the interactive process between the applicant or employee and the employer in determining a reasonable accommodation (RA).

FEHA Vocabulary

EXPLANATION OF TERMS

- "essential functions/duties"
- "physical" or "mental disability"
- "limits a major activity"
- "major life activities" and working

ESSENTIAL FUNCTIONS

- FEHA – "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires.

  Gov. Code §12926(f)

ESSENTIAL FUNCTIONS

- In order to remain employed, an employee must be able to perform the essential functions of his/her job.
- The employee must be able to perform these functions either with or without a reasonable accommodation.
- An employer may discharge an employee where he/she in unable to perform the essential functions, even with reasonable accommodations. Gov. Code §12940(a)(1)

PHYSICAL OR MENTAL DISABILITIES

- Mental or physical impairments do not necessarily rise to the level of a disability.
- A "disability" under FEHA means a mental or physical impairment which limits a person in performing a major life activity. If the person is not "limited" in this way, he/she is not disabled for purposes of seeking benefits under the disability laws such as FEHA. These benefits would include requesting a reasonable accommodation.

  Gov. Code §§12926(i) and (k)

LIMITS A MAJOR LIFE ACTIVITY

- There are several important criteria to understand in this legal concept.
- First, there must be some kind of "limitation" on the abilities of the individual, although it need not rise to the level of a "substantial" limitation.
- "A…disorder or condition limits a major life activity (MLA) if it makes the achievement of the MLA difficult." Gov. Code §12926(i)(1) (B)
- "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices or reasonable accommodations… Gov. Code §12926(i)(1)(A)

LIMITS A MAJOR LIFE ACTIVITY

- The FEHA does not require that the disability result in utter inability or substantial limitation on the individual's ability to perform MLA's. *A mere limitation is sufficient.*
- In deciding whether an employee's limitation makes him/her "disabled" under FEHA, the proper comparative baseline is either the individual's prior abilities without the impairment in question, or the average *unimpaired* person.
- Pain alone does not always constitute or establish a disability. An assessment must be made to determine how, if at all, the pain affects the specific employee's abilities. (*Arteaga v. Brink's, Inc.* (2nd DCA 2008) 163 Cal.App.4th 327)

MAJOR LIFE ACTIVITIES

- "Major Life Activities shall be broadly construed and shall include physical, mental and social activities, and working." Gov. Code §12926(i)(1)(C)
- "Major Life Activities" are functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. Primary attention is to be given to those life activities that affect employability, or otherwise present a barrier to employment or advancement. 2 CCR 7293.6

MAJOR LIFE ACTIVITIES

- The California courts have also held that engaging in sexual relations, sleeping and "interacting with others" are all "Major Life Activities". (See, *McAlindin v. County of San Diego*, (9th Cir. 1999) 192 F.3d 1226.)

- "Recognizing 'interacting with others' as a Major Life Activity of course does not mean that any catankerous person will be deemed …limited in a Major Life Activity."

  "Mere trouble getting along with co-workers is not sufficient to show a…limitation…here, there are clinical findings indicating that one of the effects of McAlindin's mental illness is a pattern of withdrawal from public places and family members."

"WORKING" AS A MAJOR LIFE ACTIVITY

- "Working" is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or class or broad range of employments.

PARTICULAR V. BROAD RANGE OF EMPLOYMENTS

- Prior to the addition of this language to FEHA in 2001, employees could not be limited in the MLA of "working" unless they provided proof that they were limited in performing a broad class or range of jobs, as opposed to just being limited in the particular job they held.
- For example, the prior rule prohibited employees from seeking reasonable accommodations of job transfers solely because they had a personality conflict with a supervisor. However, the new language has so broadened the definition of "working" that such requests now need to be considered under the reasonable accommodation standards. It remains to be seen how the courts will interpret this new definition.

WORKING AS MAJOR LIFE ACTIVITY

- Not being able to work a full 40 hour week has been found to be a "limitation" of the Major Life Activity of working. Since an average, unimpaired person can work a 40 hour week, a person who, for example, has a medical certification that his mental condition of depression made it difficult for him to work full-time, exhibits a "limitation" on the MLA of working. *(Jadwin v. County of Kern* (2009) 610 F.Supp.2d 1129.)

ENDANGERING THE HEALTH OR SAFETY OF THE EMPLOYEE OR OTHERS

- FEHA does not prohibit an employer from refusing to hire or from discharging an employee with a physical or mental disability where the employee, because of that disability, cannot perform the essential functions of his/her job without endangering his/her health or safety or the health or safety of others, even with reasonable accommodations. Gov. Code §12940 (a)(1)

THE HEALTH AND SAFETY EXCEPTION

- Safety of others defense under FEHA applied to shield parcel delivery service from liability to applicants who were denied package car driving positions due to their monocular vision (lack of depth perception) and inability to pass vision protocol, which required drivers to have some central vision and some peripheral vision in each eye.

THE HEALTH AND SAFETY EXCEPTION

- Vision protocol was reasonable means of ensuring public safety of service's employees and members of the public, and applicants' failure to meet protocol demonstrated that their performance of duties of a package car driver would endanger the health and safety of others to a greater extent than if person without disability performed the same job.

THE HEALTH AND SAFETY EXCEPTION

- Lower court's finding that "one excellent eye is as good as any two" was clearly erroneous for purposes of safety-of-others defense, given seriousness of potential consequences of complete loss of central vision while driving.

THE HEALTH AND SAFETY EXCEPTION

- The court rejected the monocular visioned employees' argument that they could overcome any safety risk by training in UPS' renowned defensive driving training program, as they did not explain how this RA would eliminate the physiologically based safety hazard caused by lack of depth perception while driving.

REASONABLE ACCOMMODATION

- Under FEHA, it is an unlawful employment practice for an employer…to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Gov. Code §12940(m)

REASONABLE ACCOMMODATION

- The California Supreme Court held in 2008 that FEHA did not require employers to accommodate an applicant or employee who used medicinal marijuana at home under the Compassionate Use Act and who failed a pre-employment drug test. (*Ross v. Ragingwire Telecom., Inc.* (2008) 42 Cal.4th 920.)

REASONABLE ACCOMMODATION

- The Supreme Court has also held that FEHA does not require employers to accommodate the use of illegal drugs. Pre-employment medical exams may include testing for illegal drugs and alcohol and employers may deny employment to those who test positive. (*Loder v. City of Glendale* (1997) 14 Cal.4th 846)

REASONABLE ACCOMMODATION

- Employers have a legitimate interest in drug testing in light of the well documented problems that are associated with the abuse of drugs and alcohol by increased absenteeism and turnover, diminished productivity, greater health costs, increased safety problems and potential liability to third parties. *(Ross v. Ragingwire Telecom., Inc.)*

REASONABLE ACCOMMODATION

- The employer's legitimate concerns about the use of illegal drugs also prompted the Supreme Court to reject the claim that pre-employment drug testing violated job applicants' state constitutional right to privacy. (*Loder v. City of Glendale)*

REASONABLE ACCOMMODATION

- Health & Safety Code §11362.785(a), passed by the Legislature in 2003, provides as follows:
- "Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment…"

INTERACTIVE PROCESS

- In order to determine an effective reasonable accommodation for a disabled applicant or employee, the employer and applicant/employee must engage in a good faith, interactive process.
- It is an unlawful employment practice for an employer to fail to engage the interactive process in response to a request for reasonable accommodation by an employee with a known physical or mental disability or known medical condition. Gov. Code §12940(n).

INTERACTIVE PROCESS

- FEHA's reference to a "known" disability is read to mean a disability of which the employer has become aware because: (1) it is obvious; (2) the employee has brought it to the employer's attention; (3) the employer has a perception – mistaken or not – of the existence of a disabling condition; or (4) the employer has come upon information indicating the presence of a disability.

INTERACTIVE PROCESS

- The four steps which comprise the interactive process are:
- (1) Identify the "barriers" to equal opportunity. This includes indentifying and distinguishing between the essential and non-essential functions and aspects of the work environment of the relevant positions at issue.

INTERACTIVE PROCESS

- (2) Having identified the barriers to job performance caused by the disability, identify possible accommodations.
- (3) Having identified one or more possible accommodations, assess the reasonableness of each in terms of effectiveness and equal opportunity.

INTERACTIVE PROCESS

- (4) Implement the accommodation that is most appropriate for the employee and the employer and that does not impose an undue hardship on the employer's operation. (See, *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1113-1114.)

INTERACTIVE PROCESS

- The express choice of the applicant or employee should be given primary consideration, unless another effective accommodation exists that would provide a meaningful equal employment opportunity. (*Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105,1113)
- Under FEHA, when more than one accommodation is reasonable, it is the employer's prerogative to choose which accommodation will be utilized. (*Jadwin v. County of Kern* (E.D.Cal. 2009) 610 F. Supp.2d 1129, citing *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226.)

INTERACTIVE PROCESS

- A good faith process requires that both sides communicate directly and exchange essential information, and neither side can delay or obstruct the process. (*Barnett v. U.S. Air)*

INTERACTIVE PROCESS

- The State Personnel Board (SPB) requires state employers to engage in an interactive process with an employee who requests a reasonable accommodation. (*Henning* Prec. Dec. 05-01) The SPB follows the guidelines as laid out in the Barnett case for engaging in the interactive process.

INTERACTIVE PROCESS

- SPB has held that a state employer has an obligation to interact with an employee even if the employee's request for RA is not reasonable (*Henning,* Prec. Dec. 05-01)
- SPB has also held that the state employer has a continuing obligation to interact with an employee if the initial RA is not successful. (*Silverman,* Prec. Dec. 07-01)

INTERACTIVE PROCESS

- Under FEHA, an employer must engage in an informal dialogue to determine effective reasonable accommodations with an applicant or employee "regarded as disabled", to assess the extent of the individual's limitations before the individual may be deemed unable to work, even if the applicant or employee is NOT actually disabled. (*Gelfo v. Lockheed Martin Corp.* (2d DCA 2006) 140 Cal.App.4th 34, Review denied Aug. 23, 2006)

UNDUE HARDSHIP DEFENSE

- An employer may deny a request for accommodation if it would create an "undue hardship" to the employer's operations. (Gov. Code §12940(m))
- "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:
- (1) The nature and cost of the accommodation needed;
- (2) The overall financial resources of the facilities involved in providing the RA, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility;

THE UNDUE HARDSHIP DEFENSE

- (3)The overall financial resources of the covered entity, the overall size of the business of a covered entity, with respect to the number of employees, and the number, type and location of its facilities;
- (4) The type of operations, including the composition, structure and functions of the workforce of the entity; and
- (5) The geographic separateness, administrative or fiscal relationship of the facility or facilities. (2CCR 7293.9(b))

UNDUE HARDSHIP DEFENSE

- Reported cases involving a defense of "undue hardship" in California courts are rare. There appear to be no reported cases where the State of California as an employer successfully claimed an undue hardship defense.
- In a 2001 case, Union Pacific Railroad argued that providing an employee with a smoke free work environment in a locomotive cab, in order to accommodate his asthma, constituted an undue hardship. The court rejected this defense.
- (*Service v. Union Pacific Railroad Co.* (E.D.Cal. 2001) 153 F.Supp. 1187.)

HAPPY TRAILS!

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TRIALS!